IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1872 OF 2005
WITH
CIVIL APPLICATION NO.1402 OF 2005

Smt.Pushpaben Mulji Kothari & ors. ..Appellants.

V/s.

Municipal Corporation of Gr.Bombay & Ors..Respondents.

Mr.V.A.Thorat,Sr.Advocate with P.J.Thorat for appellants.

Mr.D.H.Mehta with Mr.J.Xavier for respondent Nos.1 and 2.

Mr.Jahagirdar, Sr.Advocate with S.R.Bhalekar for respondent nO.3.

Mr.P.K.Dhakephalkar with P.P.Surve for respondent No.4.

CORAM: A.M.KHANWILKAR,J

DATE : FEBRUARY 14, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Mehta waives notice for respondent Nos. 1 and 2. Mr.Y.S.Jahagirdar waives notice for respondent No. 3. Mr.P.K.Dhakephalkar waives notice for respondent No.4.

4. As short question is involved, appeal is taken up for final disposal forthwith by consent.

5. This appeal takes exception to the Judgment passed by the City Civil Court, Greater Bombay on March 29, 2005 in L.C. Suit No.3153 of 2001. The said suit was filed by the appellants challenging the proposed action of the respondent Corporation for demolition of the suit structure referred to in the suit notice dated 8th June, 2001(at page 111) being unauthorised. The said suit notice was issued under section 351 of the Mumbai Municipal Corporation Act mentioning the description of the unauthorised work as construction of ground plus first floor structure with ladi coba slab, Brick masonary wall and C.I.Sheet roof admeasuring 3.90mts. x 1.50 mts. x (5.10mts. + 4.90 mts.) average height. The private respondent No.4 is stated to be the owner of the plot under suit structure. The respondent No.3 has been engaged by respondent No.4 for developing plot owned by respondent No.4 where the suit structure is standing. The trial court on the basis of rival pleadings framed as many as seven issues as follows.

ISSUES

1. Whether the plaintiffs prove that the plaintiffs and their predecessor in title are in use occupation and possession of the suit premises i.e. room on the ground floor with regarding mezanine floor and the room on the first floor admsg. Negative 300 sq.ft. or the last 50 years?

2. Whether the plffs.prove that the notice no.R/C/BF/ 351/- 2001-2002 dtd. 16.10.2001 under sec.351 of MMC Act and notice dtd.8.6.2001 and order No.A.M.C./RC/9 353/ER dated 2.7.2001 are illegal/ bad in law, void, null and void and un-enforceable in law?

3. Whether the plffs. prove that the suit is maintainable for want of notice under section 527 of M.M.C. Act?

4. Whether the defts.3 and 4 prove that the plffs. have totally illegally and unauthorizedly changed the situation of the said room?

5. Whether the defts.3 and 4 prove that the plffs. are entitled for alternate accommodation in respect of original area of tenancy i.e. ground floor only?

6. Whether the defts.3 and 4 prove that this court has no jurisdiction to entertain and try this suit?

7. What relief? What order?

6. At the outset, it needs to be noted that the of framing of issues No.5 for the nature of suit instituted by the appellants, was inappropriate. For, in a suit challenging the proposed action of the

Corporation under section 351 of the Act, the question of providing alternate accommodation by the private respondent to the appellants in respect of original area of tenancy was irrelevant. Be that as it may, after conclusion of the trial, the trial Judge proceeded to decree the suit and answered the seven issues in the following manner.

FINDINGS

1. Affirmative only regarding 53.30 sq.ft. on the ground floor and the 1st floor and the total structure of 300 sq.ft.

2. In the negative.

3. Suit is maintainable.

4. In the affirmative.

5. In the affirmative.

6. Issue redundant.

7. As per final order.

The trial Judge, consistent with the findings recorded while answering the abovesaid issues, proceeded to decree the suit on the following terms.

i) The suit is partly decreed.

ii) Defendants no.3 and 4 are hereby ordered alternate provide/commercial accommodation to all plaintiffs, together of area 65 sq.ft. in the western side already constructed building of Sidhagiri Co-op.Housing Society Ltd. on the ground floor free of costs within one month.

iii) Prayer of the plaintiff for declaration and perpetual injunction is hereby rejected.

v) Plaintiffs to execute agreement in favour of defendants 3 and 4 relinquishing all their rights of the old structure.

vi) Considering the facts and circumstances of the case, no order as to costs.

7. In this appeal, the main question arises for consideration is whether the trial Judge was justified in decreeing the suit in terms referred to above, even after recording finding on Issue No.1 in favour of the appellants/plaintiffs atleast to the extent that structure admeasuring 53.30 sq.ft. on the ground floor and first floor and total structure of 300 sq.ft. was in occupation of the appellants/-plaintiffs. The trial Judge has referred to documentary evidence produced by the plaintiffs. Amongst other, the CTS record as produced clearly indicates that the area of the suit structure was about 9 sq.mtrs in existence for over 50 years. This aspect is noted by the trial court in paragraph 17 of the impugned Judgment. In paragraph-18, the trial court has adverted to the plan sanctioned in respect of the suit structure in the year 1975 which mentions the area of ground floor as 9 ft. x 10 ft. which is around 90 sq.ft.

8. Suffice it to observe at this stage, that as there was evidence to hold that atleast portion of the suit structure was authorised constructed after plans were sanctioned and it is not as if the entire structure is unauthorised, as has been noted in the suit notice dated 8th June, 2001 at page 111, it is incomprehensible as to how the Deputy Municipal Commissioner who was expected to consider the representation of the plaintiffs has negatived the plaintiffs plea that the substantial portion of the suit structure was authorised. It is not necessary for me to go into detail the ground taken on behalf of the plaintiffs that the action of the corporation was malafide and at the behest of the private respondent No.3 and 4. That question will have to be addressed by the trial Court while considering the case afresh in view of the remand order, which I propose to pass.

9. The basis on which the trial court has proceeded to pass the abovesaid decree cannot be sustained. By no stretch of imagination as mentioned earlier, the suit questioning the correctness and validity of the notice under section 351 of the Act would enable the court to examine the stand taken on

behalf of the private respondent as to whether they were entitled to develop the property and further to facilitate them to develop property, provide alternate accommodation to the plaintiffs/appellants. I have therefore, no hesitation to set aside the decree as passed.

10. The principal question however, which will have to be addressed in the present suit filed by the plaintiffs/appellants is whether the entire suit structure is unauthorised or whether only part of the suit structure is unauthorised and to the extent it is unauthorised. Indeed, while considering this question, the stand taken on behalf of the plaintiffs appellants that the officers of Corporation have acted malafide and at the behest of the private respondent no.3 and 4 for which reason the entire action is vitiated is also relevant to the point in issue.

11. No doubt the Court below in the impugned decision has made some attempt to examine as to what extent the suit structure is authorised. However, as the court below has answered all the relevant issues No.1,2, 4 and 5 together in the impugned judgment, it is difficult to decipher as to what reason weighed

with the trial court. Moreover, ultimately the decree which has been passed is only to provide alternate accommodation to the appellants to the extent of 65 sq.ft.-which conclusion even on accepting documents produced by the respondents cannot be substantiated The sanction plan of 1975 clearly refers to permission granted to erect the structure admeasuring about 90 sq.ft. It is the case of the plaintiffs/appellants that thereafter the plaintiffs have erected first floor which is now standing on the suit site. In my opinion, the appropriate course is to set aside the impugned Judgment and decree and relegate the parties before the trial court for fresh consideration of all the relevant issues.

12. It is brought to my notice that the trial court in the impugned judgment has mentioned that defendants in particular Corporation never led oral evidence. However, according to the counsel appearing for the parties affidavit-in-lieu of examination- in-chief of the witness to be examined on behalf of the Corporation was filed before the trial Court. According to the appellants, said witness did not make himself available for cross-examination, whereas according to the counsel

for the respondent Corporation, the plaintiffs never called upon the concerned witness for cross-examination. It is not necessary to examine this controversy before this court. It will be open to the parties to agitate that aspect before the trial court. If the trial court is satisfied that in the interest of justice it will be appropriate to give opportunity to the plaintiffs to cross-examine the concerned witness of the Corporation, it may pass such direction if such request is made before it. That decision will have to be taken in accordance with the law after considering rival submission of the parties.

13. For the present, suffice it to observe that the impugned Judgment and decree cannot be sustained either on facts or in law. The trial Court was misdirected in considering the issue of providing alternate accommodation to the Plaintiffs in the present suit which challenges the action of the Corporation under Section 351 of the Act. The appropriate course therefore, as observed earlier is to relegate the parties to the trial court so that the suit can be decided afresh from the stage of framing of issues. As the matter is being remanded, it is expected that the suit will be assigned by the

principal Judge of the City Civil Court of Bombay to some other Judge than the Judge who had occasion to decide the suit by his judgment and decree dated 29th March, 2005 which is under challenge before this court.

14. Accordingly, the appeal succeeds on the above terms. All question are left open. The trial court shall decide the suit on its own merit in accordance with the law uninfluenced by any observation made in this judgment or for that matter in the impugned Judgment. The parties to appear before the trial court on 20th April, 2006 which in turn shall keep the matter for hearing as per its convenience to ensure that the suit is finally disposed of not later than end of December, 2006. As interim protection was granted to the plaintiffs appellant during the pendency of the suit the same arrangement shall continue till the suit is finally disposed of unless the trial Judge was to vary the order for the tangible reasons after considering rival submissions in that behalf.

15. Appeal as well as Civil Application disposed of on the above terms. No order as to costs.